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No. 84-1486

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

WALTER F. KERRIGAN and DOROTHY R. KERRIGAN,
Plaintiffs and Petitioners,

VS.

LUCE, FORWARD, HAMILTON & SCRIPPS, a professional corporation; STEVEN W. WALL, JULIE A. GREENBERG, SCALES, PATTON, ELLSWORTH & CORBETT, a professional corporation; LUKE R. CORBETT, RALPH E. HUGHES, MICHAEL E. WEXLER, ERWIN & ANDERHOLT, a professional corporation; DAVID M. FRANKLIN, MARINOS, STYN & STUDEBAKER, a professional corporation; RONALD L. STYN, JANA W. GREEN, EDWARD T. BUTLER,
Defendants and Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FROM RESPONDENTS LUCE, FORWARD, HAMILTON & SCRIPPS, STEVEN W. WALL and JULIE A. GREENBERG.

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QUESTION PRESENTED

Petitioners WALTER F. KERRIGAN and DOROTHY R. KERRIGAN state that the question presented to this Court is whether the amended complaint stated a cause of action. Petitioners confuse this petition for a writ of certiorari with an appeal, where the issue might properly be whether an error had been committed by the court below.

The question presented *on this petition* is only whether special and important reasons exist which would justify this Court issuing a writ of certiorari. Respondents LUCE, FORWARD, HAMILTON & SCRIPPS, STEVEN W. WALL and JULIE A. GREENBERG submit that no such reasons exist and the petition should be denied.

LIST OF PARTIES

All parties appear in the caption of this case, except that the following attorneys are members of LUCE, FORWARD, HAMILTON & SCRIPPS, a professional corporation:

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Marshall L. Foreman PC
Robert E. McGinnis PC
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Theodore W. Graham PC
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The following attorneys are of counsel to LUCE, FORWARD, HAMILTON & SCRIPPS, a professional corporation:

William Yale
Thomas M. Hamilton
Robert C. Brockway.

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I

STATEMENT OF THE CASE

A. Nature of the Case

On February 17, 1983, petitioners WALTER F. KERRIGAN and DOROTHY R. KERRIGAN (collectively

"Kerrigan") filed their original complaint, alleging violation of 42 U.S.C. section 1983. Pendant state claims for libel and slander of title were included.

Kerrigan's claims were based on an order of the California Fourth District Court of Appeal imposing sanctions for a frivolous appeal taken by WALTER F. KERRIGAN ("Mr. Kerrigan"), an attorney, and on subsequent San Diego Superior Court orders clarifying the recipient of that sanction award. When Mr. Kerrigan failed to pay the $1,000.00 in sanctions, an abstract of judgment was issued and then recorded.

Kerrigan claims that the Fourth District Court of Appeal did not have the authority to order the payment of sanctions and that the San Diego Superior Court lacked authority to enter judgment on the sanction award. They further claim that the foregoing occurrences somehow involved federally protected rights and constituted libel and slander of title under California law.

B. Parties.

1. Plaintiffs.

Mr. Kerrigan is a practicing attorney who represented Carolyn H. Whyte ("Mrs. Whyte") in several California Superior Court lawsuits between 1977 and 1982. According to his own allegations, Mr. Kerrigan is an experienced attorney, admitted to practice in several states, including California and New York, and conversant with both trial and appellate procedures.[1]

DOROTHY KERRIGAN is the wife of Mr. Kerrigan. She is not a party to the claim of libel and did not partici-

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[1]Amended Complaint, pages A-13 through A-51 of Appendix to Petition for Writ of Certiorari ("Petitioners' Appendix"), pages A-21 and A-22.

pate in any of the events leading to this most recent lawsuit. Her only claim is based upon slander of title.

2. Defendants.[2]

LUKE R. CORBETT, MICHAEL H. WEXLER, SCALES, PATTON, ELLSWORTH & CORBETT, RALPH E. HUGHES, DAVID M. FRANKLIN and ERWIN & ANDERHOLT are lawyers who represented defendants and cross-complainants in the first action brought by Mr. Kerrigan on behalf of Mrs. Whyte. First American Title Insurance Company ("First American") intervened to file a cross-complaint. By stipulation of the parties, Mrs. Whyte dismissed a portion of her claim and First American dismissed a portion of its claim. Trial proceeded on remaining claims. Mrs. Whyte was unsuccessful at trial and the stipulation was incorporated into a judgment against Mrs. Whyte, entered on April 4, 1980. Mr. Kerrigan appealed but the judgment was affirmed.

MICHAEL H. WEXLER, RALPH E. HUGHES and SCALES, PATTON, ELLSWORTH & CORBETT are lawyers who represented First American as a defendant in a malicious prosecution suit which Mr. Kerrigan brought, again on behalf of Mrs. Whyte. A demurrer to the complaint in this second action was sustained without leave to amend on the ground that a malicious prosecution suit could not be based on a dismissal by stipulation. Mr. Kerrigan again appealed. The judgment was affirmed and the California Court of Appeal specifically noted the baseless nature of the appeal, characterizing it as "a sham proceeding."

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[2]The following is based upon the record below. Because this matter is presented as background only, respondents have not requested that the record be certified and transmitted prior to action by this Court on the petition for certiorari, in accord with U.S. Sup. Ct. Rule 19.

STEVEN W. WALL, LUCE, FORWARD, HAMILTON & SCRIPPS, RONALD L. STYN and MARINOS, STYN & STUDEBAKER are lawyers who represented defendants, including some of the above-named attorneys (as well as JANA GREEN, an attorney for First American), in the third suit filed by Mr. Kerrigan on behalf of Mrs. Whyte — again alleging malicious prosecution and based on the very same facts as his prior suit. Again, a demurrer to the complaint was sustained without leave to amend. Again, Mr. Kerrigan appealed. This time, upon dismissing the appeal, the California Court of Appeal imposed sanctions of $1,000.00 against "appellant's attorney Walter F. Kerrigan for taking this frivolous appeal." The case was remitted to the trial court.

JULIE A. GREENBERG, STEVEN W. WALL and LUCE, FORWARD, HAMILTON & SCRIPPS then obtained an order from the San Diego Superior Court designating the recipient of the sanction award which, incidentally, has never been paid.

C. Proceedings Below.

Kerrigan then filed a complaint in the District Court for the Southern District of California, claiming that the imposition of sanctions by the California courts somehow violated his civil rights. They appended state law claims for libel and slander of title.

On March 15, 1983, the defendants below filed a motion to dismiss the action for failure to state a claim upon which relief can be granted. The motion was based on Kerrigan's failure to plead any of the requisite elements of a violation of 42 U.S.C. section 1983 and upon the absolute privilege given by California statute for statements made in the course of judicial proceedings. On June 6, 1983, an order was entered granting the motions to dis-

miss and giving Kerrigan 45 days in which to file an amended complaint.

On June 29, 1983, Kerrigan filed the Amended Complaint, a copy of which is attached to his petition. Defendants again filed motions to dismiss on the same grounds as the prior motions. These motions to dismiss were granted without leave to amend.

On October 7, 1983, an order was entered in the district court, dismissing the Amended Complaint. Kerrigan then appealed to the Ninth Circuit Court of Appeals. On December 17, 1984, the Ninth Circuit affirmed the trial court order of dismissal, finding the appeal frivolous.[3] Holding that "Kerrigan's conduct in this case has been both burdensome and costly to the litigants and has caused them unnecessary trouble and expense," the Ninth Circuit awarded double costs and $250.00 each to EDWARD T. BUTLER, to LUCE, FORWARD, HAMILTON & SCRIPPS and to SCALES, PATTON, ELLSWORTH AND CORBETT. These amounts have not been paid.

II

SUMMARY OF ARGUMENT

No basis exists to grant this petition for a writ of certiorari. Kerrigan's Complaint and Amended Complaint simply failed to state a claim upon which relief could be granted. The dismissal of the complaint was proper and did not conflict with applicable decisions of this Court. This petition is nothing more than one more frivolous disabuse of the judicial system by Mr. Kerrigan, for which he should be subjected to sanctions.

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[3]Petitioners' Appendix, pages A-8 to A-12.

III

ARGUMENT

Rule 17 of the Rules of the Supreme Court of the United States sets forth the general standards for seeking review of a case on a writ of certiorari:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor."

Rule 17 then sets out some categories, indicating the character of reasons that will be considered in granting or denying a writ of certiorari. Kerrigan's own brief makes it clear that this case does not fit within any of these categories and does not warrant review on a writ of certiorari. Kerrigan is merely dissatisfied with the decisions of the California courts in separate but related cases and with the decision of the district court and the court of appeals in this case that his rambling and incoherent complaint[4] does not state a cause of action.

A. The Decision of the Ninth Circuit Does Not Conflict With Applicable Decisions of This Court.

Kerrigan's only attempt to fit this case within the parameters of U.S. Sup. Ct. Rule 17 is contained in Section III of his petition.[5] There they state:

> "The court below making its own determination of the extent of jurisdiction of California courts is inconsistent with decision of the United States Supreme Court."

This argument is based entirely on Kerrigan's erroneous assertion that the "court below" made a ruling on the

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[4]Amended Complaint, Petitioners' Appendix, pages A-13 through A-51. Even a brief review of this pleading will show its inadequacy and will support the propriety of the district court's dismissal.

[5]Petition for Writ of Certiorari, pages 11-12.

propriety of state court proceedings. This is *not* what happened. Kerrigan's complaint was dismissed simply because they repeatedly failed to plead a claim upon which relief could be granted. The Ninth Circuit clearly stated:

> "We have examined the record in this case, and we find that Kerrigan has failed to allege the necessary elements of a 1983 action. Mere statements that the defendant acted illegally or that Kerrigan was entitled to 'Freedom from coercion and intimidation,' the 'Right to due process of law,' the 'Right to equal protection of law,' and other such conclusionary remarks do not satisfy the requirement of specificity for a 1983 action. Other parts of the record failed to remedy the inadequacies of the complaint."[6]

The Ninth Circuit's decision did not conflict with applicable decisions of this Court. To the contrary, the dismissal of a complaint which tries to substitute conclusory ramblings for the necessary elements of an action under 42 U.S.C. section 1983 is in clear accord with established federal law. *See, e.g., Mescall v. Burrus,* 603 F.2d 1266, 1269 (7th Cir. 1979) (upholding dismissal of a civil rights claim) and *Williams v. Gorton,* 529 F.2d 668, 671 (9th Cir. 1976) (upholding dismissal of a civil rights claim limited to conclusory claims that a constitutional right was impaired).

B. Kerrigan's Dissatisfaction With Earlier State Court Rulings Does Not Warrant a Writ of Certiorari.

Even a cursory examination of Kerrigan's petition and complaint indicates that he is merely dissatisfied with state court rulings in an isolated case. The district court was correct in dismissing Kerrigan's complaint because their individual dissatisfaction with the state court proceedings

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[6]Memorandum Decision, United States Court of Appeals for the Ninth Circuit, page A-10, Petitioners' Appendix.

was not a proper basis for a section 1983 claim. *Environmental Aid, Inc. v. Goddard,* 433 F.Supp. 906, 911 (W.D. Pa. 1977). As the court noted in *Buckley Towers Etc. v. Buchwald,* 595 F.2d 253, 254 (5th Cir. 1979):

> "[T]he Civil Rights Acts do not provide a remedy against unfounded or even malicious claims or suits in state courts."

See also, Curry v. Ragen, 257 F.2d 449, 450 (5th Cir. 1958), *cert. den.,* 358 U.S. 851 (1958).

Even if Kerrigan were correct that the California state court imposition of sanctions for a frivolous appeal was improper, that would not justify the issuance of a writ of certiorari. No question of general importance is presented because, among other reasons, after the sanction order was issued against Mr. Kerrigan, the California Supreme Court changed the procedures for granting sanctions on a frivolous appeal. *In re Marriage of Flaherty,* 31 Cal.3d 637 (1982). Where an issue sought to be reviewed concerns a statute no longer in effect, the issue does not merit consideration by the United States Supreme Court. *District of Columbia v. Sweeney,* 310 U.S. 631 (1940) (holding that the matter was no longer of public importance); *Rice v. Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 76-77 (1955), in which the Supreme Court dismissed a writ of certiorari as improvidently granted noting:

> "Had the statute [changing the law under which the case was originally brought] been properly brought to our attention and the case thereby put into proper focus, the case would have assumed such an isolated significance that it would hardly have been brought here in the first instance."

C. Kerrigan's Claim of an Erroneous Decision Below Does Not Justify a Writ of Certiorari.

Kerrigan's entire claim is that the district court and the court of appeals erred in deciding the case:

> "The court below erred. . . ."[7]
>
> "Court below erred. . . ."[8]
>
> "Court below premised its decision on clear misrepresentations of state court proceedings not in issue."[9]
>
> "The court below erred. . . ."[10]
>
> "The court below erred. . . ."[11]
>
> "Court below erred. . . ."[12]
>
> "Court below erred. . . ."[13]

This isolated dissatisfaction does not justify intervention by this Court. The United States Supreme Court does not "sit for the benefit of the particular litigant." *Rice v. Sioux City Memorial Park Cemetery, Inc., supra,* at 74.

> "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties. . . .'"

N.L.R.B. v. Pittsburgh S.S. Co., 340 U.S. 498, 502 (1951).

D. Kerrigan's Arguments on Attorneys' Fees and Costs Should Be Ignored.

In his petition, Kerrigan raises two issues relating to attorneys' fees and costs. Neither is relevant on a petition

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[7]Petition for Certiorari, Section IV, page 13.

[8]Petition for Certiorari, Section V, page 14.

[9]Petition for Certiorari, Section VI, page 15.

[10]Petition for Certiorari, Section IX, page 22.

[11]Petition for Certiorari, Section X, page 23.

[12]Petition for Certiorari, Section XI, page 24.

[13]Petition for Certiorari, Section XV, page 29.

for certiorari and their entire discussion of the matters should be ignored as ludicrous and incorrect as a matter of law.

1. The Ninth Circuit Had Discretion to Award Attorneys' Fees and Double Costs.

Kerrigan's argument that the court of appeals did not have authority to award fees and costs is based on a typographical error in the Memorandum Decision. The court inadvertently referred to the "Federal Rules of Civil Procedure," instead of the Federal Rules of Appellate Procedure. Kerrigan was not misled, as the matter was clearly stated in the briefs to the Ninth Circuit.

An award of attorneys' fees and double costs was appropriate in this case. Kerrigan is incorrect in claiming that the Ninth Circuit did not make findings justifying the award. The court of appeal specifically found that:

> "Kerrigan has made serious allegations, which lack any merit against many lawyers and a judge, and he has filed this action based upon an earlier state court action, which both trial and appellate courts have dismissed. The California Court of Appeals characterized one appeal as 'a sham proceeding' and in another case imposed a $1,000 sanction against Kerrigan 'for taking this frivolous appeal.'
>
> "Kerrigan's conduct in this case has been both burdensome and costly to the litigants and has caused them unnecessary trouble and expense."

Kerrigan argues that the sanction award was based on actions in the California courts.[14] This is simply untrue. The award was specifically based upon Kerrigan's multiplication of proceedings before a United States court[15]

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[14]Petition for Certiorari, Section XIV, page 28.

[15]Petitioners' Appendix, page A-11.

and upon the meritless and expensive action filed by them in the district court.[16]

2. No Basis Exists for Kerrigan to Claim Error in Not Imposing Sanctions Against Seltzer Caplan Wilkins & McMahon.

At the end of the brief, Kerrigan raises the preposterous notion that the court of appeals should have imposed sanctions against respondents' attorneys! No factual or legal basis exists for this claim; no such request was ever made to the court of appeals. The entire issue is completely irrelevant on a petition for a writ of certiorari. The claim is merely the latest example of Mr. Kerrigan's proclivity to attack every lawyer who gets in the way of his vendetta.

E. Kerrigan Should Be Subjected to Sanctions for Filing This Petition.

Mr. Kerrigan is an attorney. As such, he owes a duty to the courts and to society to not take advantage of his position. Instead of following this duty, he has forced the various parties to defend themselves before the California Superior Court for the County of San Diego, the California Fourth District Court of Appeal, the District Court for the Southern District of California and the Ninth Circuit Court of Appeals. Each of these courts has confirmed that Mr. Kerrigan's claims are baseless and frivolous. Still not satisfied, he has filed this petition, knowing that no basis exists for a writ of certiorari and knowing that the sole effect will be to cause increased attorneys' fees and costs to respondents.

Mr. Kerrigan's activity constitutes unprofessional conduct. *Polk County et al. v. Dodson*, 454 U.S. 312, 323 (1981): "It is the obligation of any lawyer . . . not to clog the courts with frivolous motions or appeals." Sanctions should be imposed under U.S. Sup. Ct. Rule 49.2.

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[16]Petitioners' Appendix, pages A-11 and A-12.

"This appeal is an attempt to invoke the Court's jurisdiction on an utterly frivolous claim. Such efforts should subject the attorney who filed the jurisdictional statement to the sanction of Rule 49.2 of this Court, at least where, as here, the appellee has moved for an award of costs and fees."

Talamini v. Allstate Insurance Co., No. 84-18, slip op. (U.S. Sup. Ct. Mar. 25, 1985) (available on LEXIS, Gen. Fed. Library, Sup. File), (Burger, C.J., concurring).

IV

CONCLUSION

The petition for writ of certiorari filed by WALTER F. KERRIGAN and DOROTHY R. KERRIGAN lacks any merit. It should be denied and sanctions should be imposed on petitioners to at least partially compensate respondents LUCE, FORWARD, HAMILTON & SCRIPPS, STEVEN S. WALL and JULIE A. GREENBERG for the expenses incurred in opposing this petition.

DATED: May 1, 1985

Respectfully submitted,

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